GK Trucking Corporation *and* Robert J. Snell. Case 33-CA-5141

June 30, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On October 21, 1981, Administrative Law Judge Robert A. Giannasi issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief in opposition.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.[1]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] In adopting the Administrative Law Judge's recommendation to dismiss the complaint in its entirety, Members Hunter and Jenkins note their agreement with the finding that the employees were not engaged in protected activity. Accordingly, they find it unnecessary to rely on the Administrative Law Judge's comments concerning the proper disposition of this proceeding assuming that the activity had been protected.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge: This case was heard on July 7, 1981, in Champaign, Illinois. The complaint alleges that Respondent violated Section 8(a)(1) of the Act by discharging employees Robert Snell and Richard Kissir because they engaged in protected concerted activity; i.e., by failing to report for work and seeking assistance from a union representative to protest their working conditions. Respondent denied the essential allegations in the complaint. The parties filed briefs.

Based on the entire record herein, including my observation of the demeanor of all the witnesses, I hereby make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a Connecticut corporation with an office and place of business located in Urbana, Illinois, is engaged in the interstate and intrastate transportation of freight and bulk material. During a representative 1-year period, Respondent derived revenues in excess of $50,000 from transporting materials directly from one State to another. Accordingly, I find, as Respondent admits, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

Until the summer of 1980,[1] Respondent operated a terminal in St. Louis, Missouri. Robert Snell and Richard Kissir worked as mechanics at the St. Louis terminal. When the terminal was closed at the end of June 1980, Snell and Kissir were laid off. Both, however, were offered employment at Respondent's newly opened terminal at Urbana, Illinois. Snell began work at the Urbana facility on July 1 and Kissir became employed there in the latter part of July or the first part of August. Charles Weber was their immediate supervisor in both locations, first as maintenance supervisor in St. Louis and, later, as terminal manager in Urbana.

Snell and Kissir were represented by Teamsters Local 618 when they worked in St. Louis and they were covered under the Local 618 bargaining agreement prior to beginning work in Urbana. Snell was told by Regional Terminal Manager Robert Jackson that no labor organization represented the employees in Urbana but that he expected that the shop would be organized. Either Jackson or Weber told Kissir that he could join a union in Urbana. They also told Kissir that he would be hired as a new employee. Both employees were told that no contract covered the mechanics at the Urbana facility. Prior to the employment of Kissir and Snell in Urbana, Respondent had employed another mechanic, Don Rennels, for that facility. Rennels was designated as a lead mechanic or leadman. Snell's and Kissir's hours of employment in Urbana were from 8 a.m. to 4:30 p.m. Snell worked 5 days per week with Sunday and Wednesday off; Kissir was off on Sunday and Tuesday.

The drivers, but not the mechanics, at the Urbana facility became represented by Teamsters Local 26. Snell and Kissir remained unrepresented and never contacted a union representative while they were employed.

Snell and Kissir did, however, discuss among themselves a prospective raise which they believed had been promised to them by Jackson when he talked with them in St. Louis about working in Urbana. According to Snell and Kissir, Jackson told them that they would be earning the same wages in Urbana as they earned in St. Louis. When they began their employment in Urbana they earned $9.35 per hour—the same amount they were earning in St. Louis. In August 1980, the St. Louis

[1] All dates hereinafter will be in 1980 unless otherwise specified.

Teamsters contract called for a 90-cent-per-hour raise. When this raise was not reflected in their paychecks, Snell and Kissir discussed the matter and agreed that Snell should speak to Terminal Manager Weber about the raise.

In mid or late August, Snell met with Weber in the latter's office. He first asked about reimbursement of the health insurance premiums which he and Kissir had been paying since he began work at Urbana. Snell and Kissir had been told that, until Respondent developed a health insurance plan for Urbana, the employees should pay their own premiums and Respondent would reimburse them. Weber acknowledged that these expenses would be reimbursed. Snell also mentioned his understanding of the expected raise. Weber told Snell he would check into the matter and get back to him with an answer.

Weber called all three mechanics together, 2 or 3 days later, and told them that he had checked into the issue of a possible raise. He said Respondent's officials had agreed to grant a 50-cent-per-hour raise and to reassess the situation again in November. He also said that Respondent was working on obtaining a health insurance policy for the mechanics. None of the employees objected to this resolution of the issues.

On September 25, Weber informed Kissir that he would be laid off at the end of the workday on September 27, a Saturday. Later that day, Weber told Snell that Kissir was being laid off, leaving Snell and Rennels as the only mechanics at the Urbana terminal. Even before the layoff was announced, Snell and Kissir had complained to each other that Rennels was not doing very much work compared to them and that this necessarily increased their workload. However, they did not mention this complaint to Weber or any other management official.

Snell and Kissir were scheduled to begin work at 8 a.m. on Saturday, September 27. Snell and Kissir met as they were preparing to leave for work. They discussed Kissir's layoff and the fact that Snell would have to work alongside Rennels. They then decided on the "spur of the moment" to attend a driver's meeting scheduled that day at a local motel in order to elect a union steward. The meeting was to take place at a local motel. Kissir and Snell hoped to talk to a union representative at that meeting. Snell testified that, on the morning of September 27, they decided to attend the meeting in order to "talk to [the drivers' union business agent] and see if he will represent us" and to "see if they [the Union] could do anything for us or represent us or so forth." Kissir described the decision to attend as follows: "Jim and I had talked and decided that for our best interests you know as far as working conditions and everything else related to work that it would be a good idea to go to this meeting and see if we could get something straightened out."

Kissir and Snell went to the meeting which was scheduled to begin between 8:30 and 9 a.m. They arrived at or about 8:10 a.m. There was in fact no union business agent at the drivers' meeting and there is no evidence that Snell and Kissir discussed their work-related problems with anyone at the meeting. They did not call Respondent to let anyone know that they would not be at work, even though, at one point, Snell testified that they intended to report to work about "an hour late." Both Kissir and Snell knew that Saturday was a particularly heavy workday.

At approximately 8:30 a.m., Terminal Manager Weber noticed that neither Snell nor Kissir was at work. He learned from Tom Lane, the dispatcher, that they were attending the drivers' meeting at a local motel. He then called the motel and talked to Snell. He reminded Snell that he was required to be at work at 8 a.m. Snell said that he and Kissir were going to attend the drivers' meeting. Snell told Weber that he and Kissir had some "problems" and that they were going to attend the meeting for union representation. Snell also said, "[A]fter the meeting we will come to the terminal." According to Weber, he again informed Snell he was supposed to be at work at 8 a.m., and Snell said, "Well, fire me if you want to." After a pause, Weber did so. According to Snell, he said, "Do whatever you have to do," and thereafter Weber told him he was fired.

Weber also called Kissir and asked him why he was not at work. Kissir told Weber that he and Snell had some "problems" to "work out" and that he was going to attend the drivers' meeting. When Kissir refused to report to work Weber terminated him. According to Weber, Kissir did say that he "would be down" after the meeting. Kissir did not testify that he mentioned going to work at anytime on Saturday, although he testified he fully intended to go to work after the meeting.

In letters from Terminal Manager Weber dated September 27, 1980, and received by Snell and Kissir a short time later, Respondent stated that each had been "terminated effective 9-27-80, for failing to report to work or call in on 9-27-80."

A meeting was arranged between the terminated employees and Weber several days after the discharge at the Urbana terminal. Snell, Kissir, and John Hit, the alternate shop steward for the drivers, met with Weber. Snell apologized for having caused Weber some problems by not showing up for work but he reiterated that he and Kissir "had to get things straightened out." At this meeting, Weber learned for the first time of the concern by Snell and Kissir that Rennels had not been helping them with their work. Prior to this meeting, neither Kissir nor Snell had voiced to management any of their alleged concerns except for the pay raise and the health insurance problems. There was no further mention of these matters after Weber announced Respondent's policy on these two issues in late August or early September.

Respondent hired one mechanic in October to replace Snell. At the time of the hearing, Respondent employed only two mechanics at the Urbana facility.

B. *Discussion and Analysis*

The issue to be resolved herein is whether the General Counsel has shown by a preponderance of the evidence that Respondent discharged employees Snell and Kissir for engaging in protected concerted activities by absenting themselves from work on the morning of Saturday, September 27, in order to attend a union meeting. Re-

spondent's assigned reason for the discharges was the employees' failure to report for work and to call in on September 27.

The General Counsel contends that Snell and Kissir were discharged for engaging in a collective work stoppage to protest working conditions within the meaning of *N.L.R.B.* v. *Washington Aluminum Co.*, 370 U.S. 9 (1962), and *Robertson Industries*, 216 NLRB 361 (1975), enfd. 560 F.2d 396 (9th Cir. 1976). Respondent argues that Snell and Kissir were not engaged in a protected work stoppage. According to Respondent, the employees were not intentionally withholding their services in order to protest or to pressure Respondent into improving their terms or conditions of employment. Rather, they simply absented themselves from work to attend a union meeting away from their work premises on worktime for the purpose of seeking representation. In support of its position, Respondent cites and relies on *Gulf Coast Oil Company*, 97 NLRB 1513, 1516 (1952), and *Terri Lee, Inc.*, 107 NLRB 560, 562 (1953).

In *Washington Aluminum*, the Supreme Court upheld the Board's finding that a spontaneous work stoppage to protest extremely cold conditions in the workplace was a protected exercise of employees' Section 7 rights. The Court stated:

> Having no bargaining representative and no established procedure by which they could take full advantage of their unanimity of opinion in negotiations with the company, the men took the most direct course to let the company know that they wanted a warmer place in which to work. So, after talking among themselves, they walked out together in the hope that this action might spotlight their complaint and bring about some improvement in what they considered to be the "miserable" conditions of their employment. [*Id.* at 15.]

The Court rejected the view of the court of appeals which refused to enforce the Board's order because the employees did not afford the employer an "opportunity to avoid the work stoppage by granting a concession to a demand." (*Id.* at 13.) The Court stated that employees do not "necessarily lose their right to engage in [protected activity] merely because they do not present a specific demand upon their employer to remedy a condition they find objectionable. The language of § 7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made." (*Id.* at 14.) The Court also stated that the walkout was related to conditions of employment since, as the Board had found, there was a "running dispute between the machine shop employees and the company over the heating of the shop on cold days." (*Id.* at 15.)

In *Robertson*, the employees engaged in a work stoppage to protest a heavy workload and returned to work after an unlawful threat of discharge. They thereafter sought union representation and petitioned for an election. The employer committed violations of Section 8(a)(1), including a threat to discharge employees for engaging in the walkout. Thereafter, some employees met with union representatives and arranged for a union meeting to discuss their work-related complaints and the union filed an election petition. A number of employees absented themselves from work the day of the meeting. The meeting, which was attended by most but not all of the absentees, was held during the regular workhours of the first-shift employees. Although the meeting was over in time for the second-shift employees to report for work, many of the latter did not report for work. The next workday, the respondent fired all the employees who did not report for work on the day of the union meeting. The Administrative Law Judge found that the employees were engaged in a "concerted work stoppage" but found no violation because, *inter alia*, the purpose of the meeting was not to resolve problems or to seek immediate concessions. The Board reversed, finding that a purpose of the union meeting was "to find a way to resolve work-related problems" and "to seek help in securing a resolution," emphasizing that the employees' earlier attempt to "directly resolve their work-related problems . . . was met with an unlawful threat of discharge." Thus, the Board found that the employees were "in the initial stages of protesting their terms and conditions of employment and of seeking concessions from the [employer]." Analyzing the evidence surrounding the discharges, the Board concluded that, in discharging the employees, the employer was "substantially motivated by a desire to rid itself of employees" who engaged in protected concerted activity and found a violation.

While it is clear that employees may not be discharged for engaging in concerted work stoppages to protest working conditions, they are generally not entitled to engage in union or protected activities on worktime. See *Republic Aviation Corporation* v. *N.L.R.B.*, 324 U.S. 793 (1945). In *Gulf Coast Oil Company*, 97 NLRB 1513, instead of reporting for work at the usual time, employees attended a union meeting to discuss representation by the union. They signed union cards at this meeting. The employees then returned to work 3 hours late. The Board found that this activity was not protected but rather that it amounted to an "unwarranted usurpation of company time by the employees to engage in a sort of union activity customarily done during nonworking time." (*Id.* at 1516.) In *Terri Lee, Inc.*, 107 NLRB 560, several employees absented themselves from work to consult with a union about a cut in their piece-rate wages. All went to the union hall instead of reporting for work. The next day they were discharged. The Board concluded that these employees had not engaged in a strike or a concerted withholding of work. It found rather that the employees "merely intended to take the day off to obtain information from the Union, without any purpose thereby of protesting the cut in piece rates or of seeking any concession from" their employer. (*Id.* at 562.) These cases have not been overruled and they are not inconsistent with *Washington Aluminum* or *Robertson*.[2]

[2] In *Robertson*, the Board reversed the Administrative Law Judge, who had relied on *Gulf Coast* and *Terri Lee* in dismissing the complaint. However, the Board did not even mention those cases in its decision and it must be presumed that it found them distinguishable.

Applying the principles set forth in the above authorities, I find that the General Counsel has failed to prove a violation of the Act by a preponderance of the evidence.

Snell and Kissir were not engaged in a work stoppage in the traditional sense, nor were they engaged in a protest of their working conditions or an attempt to seek concessions from Respondent. They failed to notify Respondent of their absences but later told an official of Respondent that they were attending a union meeting in order to seek representation. They never identified their concerns to Respondent. Earlier problems with wage increases and insurance premiums had been resolved satisfactorily. Two other problems—Kissir's layoff and an objection to another employee not pulling his weight—had not been mentioned to Respondent. There is no evidence that these problems or any problems concerning working conditions were taken up at the union meeting. Indeed, the specific purpose of the meeting was for drivers, who were represented by a union, to elect stewards. Snell and Kissir, who were unrepresented mechanics, apparently did not follow through on efforts to speak to a union business agent about their problems. Even after the discharges, when Kissir and Snell, in the presence of the drivers' union steward, did tell an official of Respondent of their concern that another mechanic was not pulling his weight, there was no effort made to seek a resolution of that alleged problem as it affected their working conditions. Finally, the evidence shows that the employees intended to come to work after the meeting and mentioned this to Respondent.

Thus, the employees herein failed to report for work in order to attend a union meeting whose purpose was unrelated to their own concerns and which took place on worktime. Although they perhaps intended to discuss their work problems with union officials at that meeting, their avowed purpose was to seek representation. This is the very kind of activity which can and should take place on employees' own time. There was no urgency which called for a worktime consultation with union officials and indeed no evidence that work-related problems were actually discussed at such a meeting or that the employees, either at that meeting or at any other time, organized their endeavor into a protest which involved or affected working conditions.

Unlike the employees in *Washington Aluminum*, Snell and Kissir did not demonstrate that they were withholding their labor in protest against working conditions or to bring pressure on Respondent to have those conditions changed, factors which are the very essence of a work stoppage or strike. Thus, unlike in *Washington Aluminum*, where the walkout itself and the circumstances surrounding it communicated to the employer that the conduct was taken "to correct conditions which modern labor-management legislation treats as too bad to have to be tolerated" (370 U.S. at 17), the conduct and explanations of Kissir and Snell are wholly inconsistent with a work stoppage to protest terms and conditions of employment. On the contrary, here the employees told an official of Respondent that they were seeking union representation to work out "problems" and that they intended to return to work after the meeting.

In addition, unlike in *Washington Aluminum*, here there was no "running dispute" between Respondent and the employees about work-related issues which prompted a walkout or strike. At the hearing, Snell and Kissir suggested that the "problems" which led them to attend the union meeting rather than to report for work included Kissir's layoff—Saturday was Kissir's last workday—and their objection to a third mechanic, Rennels, not pulling his weight on the job. However, these work-related problems were never addressed to Respondent before the employees attended the union meeting. Nor is there any evidence that these problems were mentioned in the union meeting itself. The first time the Rennels "problem" was mentioned to Respondent was several days after the discharge and there is no evidence that, even then, the employees sought a solution to the so-called problem. The problem, if any, with Kissir's layoff was never mentioned to Respondent.[3]

Unlike in *Robertson*, the employees herein did not engage in a concerted work stoppage as part of a program "of protesting their terms and conditions of employment and of seeking concessions from Respondent." In *Robertson* there was evidence that many employees stayed away from work even though their shifts began after the end of the union meeting. There was also evidence that the employees discussed work-related problems at the meeting which was called specifically for that purpose. The Board thus viewed the meeting simply as one aspect of the work stoppage and the overall protest of the employees. Moreover, in *Robertson*, the worktime meeting took place in the context of a union campaign and after a prior work stoppage was met with a threat of discharge. Here, in contrast, there was no evidence that Snell and Kissir intended to engage in a work stoppage apart from their attendance at the union meeting. Moreover, there is no evidence in this record that Snell and Kissir discussed work-related problems or solutions at the meeting which was for the purpose of electing job stewards for another group of employees. Thus, like the employees in *Gulf Coast* and *Terri Lee*, Kissir and Snell absented themselves from work simply to attend a union meeting in order to seek representation, an activity normally done on nonworking time, and in circumstances which did not suggest urgency or any other justifiable reason to absent themselves from work.

However, even if the worktime activity of Snell and Kissir were deemed to be protected here, as it was in *Robertson*, the evidence here fails to show, as it did in *Robertson*, that the discharges were improperly motivated. The crux of the *Robertson* decision was a finding by the Board that the employer "was substantially motivated" by a desire "to rid itself" of employees who engaged in protected concerted activities. In addition to the threats of discharge for engaging in a previous work

[3] There was no other dispute between the employees and Respondent. The General Counsel alludes to problems concerning a health insurance plan and a 50-cent rather than a 90-cent raise as contributing causes for the employees' activity. However, both problems were addressed by Weber and they were resolved when Respondent outlined its position in late August. There is no evidence that Snell and Kissir were dissatisfied with the resolution of these issues or thereafter mentioned these matters to Respondent or even mentioned them in the union meeting.

stoppage, the Board relied on the fact that the discharges took place "within a few days of a pending election" and that even those employees who received permission to be absent were fired. No such evidence is present here. Indeed, this Respondent recognizes unions for other of its employees. Kissir and Snell belonged to a union when they worked at Respondent's St. Louis facility and Respondent made clear that it had no objection to Kissir and Snell joining a union after their employment in Urbana. Respondent dealt with them openly and in good faith in attempting to resolve all the work-related problems brought to its attention whether the employees acted in concert or not. Nor is there any evidence in this record of disparate treatment. There is no evidence that Respondent tolerated absences or failures to seek advance permission for absences in circumstances such as those present here where the reason for the absences was something other than attending a union meeting. Finally, the General Counsel emphasizes that Snell and Kissir were discharged only after telephone calls confirmed to Respondent that they were attending a union meeting. However, nothing in the telephone conversations warrants the inference that Respondent was more concerned about the employees' attendance at a union meeting than their having absented themselves from work on a busy Saturday without prior notification. Respondent was not obligated to discharge the employees before making an attempt to contact them to see if there were extenuating circumstances for their absences. In any event, this sole piece of evidence standing alone is insufficient to establish the kind of improper motive which carried the day in *Robertson.*

CONCLUSION OF LAW

Respondent has not violated the Act.

Based upon the above findings and conclusion and the entire record herein, I issue the following recommended:

ORDER[4]

The complaint is dismissed in its entirety.

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[4] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.